NO._____

United States
Circuit Court of Appeals
for the Ninth Circuit

DAISY S. KOHLER,

Appellant,

vs,

YEOMAN MUTUAL LIFE INSURANCE COMPANY and CLARA KOHLER,

Appellees.

Petition for Rehearing

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Attorney for Appellant and Petitioner.

Filed....., 1939.

.....Clerk.

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The Court is respectfully requested to grant a rehearing for the following material matters of law apparently overlooked by the court:

1.

The Court held (Printed Opinion, page 4): "The change of beneficiary from Appellee was in conformity with insurers by-laws and was valid and effective notwithstanding the contract of February 20th, 1929,

between decedent and appellant wherein decedent agreed that appellant should remain his beneficiary."

Insurer *waived all of its by-laws* by interpleading the contesting claimants and they cannot be taken advantage of by any one but insurer.

See appellant's brief, pages 9 and 10 and Iowa authorities therein cited to-wit: Thomas vs. Locomotive Engineers, 191 Iowa 1163, 133 NW. 628, 15 L. R. A. on page 125 and citing Holden vs. Modern Brotherhood, 151 Iowa 673, 132 NW. 329.

(We cite only Iowa cases, but find this rule universally followed.)

II.

This Court held (Opinion, page 4): "Insurer being a Fraternal Beneficiary Association incorporated in Iowa, the rights of its members and beneficiaries must be determined by the laws of that state."

Iowa Statute Sec. 8788, provides:

> "No beneficiary shall have or obtain any vested interest in said benefit until the same shall become due and payable upon the death of said member."

Insofar as it purported to give appellant a vested interest in the death benefit here involved the contract of February 20, 1929, was illegal and void."

The Court apparently overlooked the decisions of

the Supreme Court of Iowa on this section. In three decisions, all recent, the Supreme Court of Iowa approved the decisions set forth on appellant's brief, pages 7, 8 and 9.

See Beed vs. Beed, 207 Iowa 934, 222 NW. 442.

Jacobson vs. New York Life, 199 Iowa, 770, 202 NW. 578.

And in holding that the rule in the above cases applies to Fraternal Benefit Societies:

Sovereign Camp W. O. W., vs. Russell, (March 1932), 214, Iowa 39, 241 NW. 395

We quote:

"In some respects the cases of Beed vs. Beed, 207 Iowa 954, and Jacobsen vs. New York Life Ins. Co., are very similar to the instant case. In the Jacobsen case there was reserved the right to change the beneficiary which right existed in the case at bar. In that case we endorsed this rule:

> " 'The rule in this state is, that while the assured may, *in the absence of intervening equities,* change at will the beneficiary named in the insurance policy, equitable rights may be acquired in a beneficiary certificate of insurance which a court of equity will recognize and enforce'."

We followed this doctrine in the Beed case, supra, which seems to be the *universal doctrine in this country.*

See Locomotive Engineers Mutual Life and Accident Assurance Company vs. Waterhouse 257 S. W. (Texas) 304; Columbian Circle vs. Mudra, 132 N. E. 213; Gaston v. Clabaugh, 186 Pac. (Kans.) 1023; Supreme Council of Royal Arcanum v. Alexander, Atl. (N. J.) 276; Supreme Council of Catholic Benevolent Legion v. Murphy, 55 Atl. N. J. 497; McKeon v. Ehringer, 95 N. E. 604 (Ind.); Savage v. Modern Woodmen, 113 Pac. 9 Kans. 802; Great Camp K. O. M. v. Savage, 98 N. E. (N. Y.) 197; Stronge v. Supreme Lodge K. of P., 12 L. R. A., N. S. (N. Y.) 1206. Followed by an exhaustive note on this subject; Savage vs. Modern Woodmen of America, 33 L. R. A., N. S. (Kans.) 773, followed by a note on the same subject; Jory v. Supreme Council American Legion of Honor, 26 L. R. A. (Cal.) 733.

Each and all of the cases last cited, together with our own cases, hold to the general rule that where an agreement of this kind is made and carried out by a party other than the assured, such party acquires, in equity, a vested interest, in the proceeds of the policy of which, in the absence of countervailing equities, he cannot be deprived. What is here said is to meet the contention of appellee that the Iowa cases cited were not Mutual Benefit Society

policies, and therefore the *Iowa rule* would not apply to the sort of policy we have in this case. All the cases above cited are cases, where the policy was issued by mutual societies, and *therefore no distinction can be made in this respect as to the kind of corporation which issued the policy.*"

The opinion then goes on to deny relief to appellee on the ground that Iowa has a special statute in the particular case where the "agreement not to change the beneficiary" is based on a consideration of paying the assessments. "Expressio Unis est Exclusio Alterius."

We submit that the law in Iowa is as contended for by appellant and that these decisions were overlooked by the court.

III.

We quote from the opinion, page 5:

> "Appellant complains of the trial courts finding that, by the contract of September 9, 1930, appellant agreed to relinquish the certificate and all her rights thereunder. The evidence tho conflicting, supports the finding. We conclude, therefore, that assuming its validity, the contract of February 20, 1929, insofar as it related to the certificate was abrogated by the contract of September 9th, 1930."

We submit that the court has overlooked that this

contract (if it was one) and both contracts involved were Montana contracts and they at least were governed by the laws of Montana.

See 12 C. J. Conflict of Laws, Art. 30, "Place of Making."

Appellant's brief, page 14, sets out the Montana Statute 7569 R. C. M. 1921 and 1935:

> "A contract in writing may be altered by an executed oral agreement and not otherwise." (Note this is a law of contract and not a rule of evidence) and
>
> "An oral agreement is not executed unless its terms have been fully performed and performance on one side is not sufficient.'
>
> Continental Oil vs. Bell, 94 Mont. 123, on page 134-21 Pac. 2nd 65.

Apparently these points were overlooked by the Court.

It is respectfully petitioned that a rehearing be granted.

Signed, T. H. MacDONALD,
Attorney for Appellant.

T. H. MacDonald certifies that he is attorney for the appellant in this action and that the foregoing petition in his judgment is well founded and is not interposed for delay.

T. H. MacDonald